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Semachko v. Hopko: Ohio's Marketable Title Act Comes to the Fore

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CASE COMMENTS

Semachko v. Hopko: *Ohio's Marketable Title Act Comes to the Fore*

THE OHIO MARKETABLE TITLE ACT¹ became effective on September 29, 1961.² The purpose of the Act is to simplify and facilitate land title transactions.³ This is accomplished by allowing the title examiner to search the record for title defects for only a specified period of years back in time; all claims prior to that period are extinguished. The period of time in Ohio is forty years.⁴ Therefore, if a person has a record chain of title for forty years, then any conflicting claims based upon any title transactions prior to that forty year period are extinguished.⁵ The basic concept is simple, but there are many technicalities in the Ohio Marketable Title Act. For this reason, the Act is little known, little used, and even less understood. This is amply demonstrated by the fact that on August 23, 1973, twelve years after the Act's passage, the Eighth District Court of Appeals was the first Ohio court to apply the Act, in *Semachko v. Hopko*.⁶

The purpose of this comment is threefold:

1. To show the reasons for the need of such an act in Ohio and its development from the Model Act.⁷
2. To show an application of the Act as exemplified by *Semachko*.
3. To point out further problems and technicalities outside the scope of *Semachko*.

¹ OHIO REV. CODE ANN. §§5301.47-.56 (Page 1970), as amended (§§5301.53 & 5301.56) (Page, Current Material 1974).

² *Semachko v. Hopko*, 35 Ohio App.2d 205, 209, 301 N.E.2d 560, 563 (8th Dist. 1973).

³ *Id.* at 209, 301 N.E.2d at 563.

⁴ OHIO REV. CODE ANN. §5301.47 (E) (Page 1970).

⁵ This is the general concept for the method of applying the Ohio Marketable Title Act, but, as will be seen in the ensuing discussion, this is something of an understatement because of the many exceptions and intricacies of the Act.

⁶ 35 Ohio App.2d 205, 301 N.E.2d 560 (8th Dist. 1973).

⁷ The Ohio Marketable Title Act is identical to the Model Act except for the additions in the Ohio Act of the following provisions in italics:

§5301.49 Limitations on record marketable title.

Such record marketable title shall be subject to:

(A) All interests and defects which are inherent in the muniments of which such chain of record title is formed; . . . *provided that possibilities of reverter, and rights of entry or powers of termination for breach of condition subsequent, which interests are inherent in the muniments of which such chain of record title is formed and which have existed for forty years or more, shall be preserved and kept effective only in the manner provided in section 5301.51 of the Revised Code;*

§5301.53 Exceptions.

The provisions of sections 5301.47 to 5301.56, inclusive, of the Revised Code, shall not be applied:

(Continued on next page)

Background

The Ohio Marketable Title Act became effective September 29, 1961, making Ohio the tenth marketable title act jurisdiction⁸ and one of the jurisdictions which patterned its act on the Model Marketable Title Act⁹ prepared by Simes and Taylor for the Real Property, Probate and Trust Law Section of the American Bar Association and the University of Michigan Law School.¹⁰ This committee was formed to find a solution to the problems of long title searches to determine marketability of any given title.¹¹ The problems encountered by the length of some title searches are amply displayed by this illustrative, if not amusing, anecdote:

A New Orleans lawyer sought a Reconstruction Finance Corporation loan for a client. He was told that the loan would be granted if he could prove satisfactory title to property offered as collateral. The title dated back to 1803, and he had to spend three months running it down. After sending the information to the RFC he received this reply:

(Continued from preceding page)

(A) To bar any lessor or his successor as reversioner of his right to possession on the expiration of any lease or any lessee or his successor of his rights in and to any lease;

(B) To bar or extinguish any easement or interest in the nature of an easement created or held for any railroad or public utility purpose;

(C) . . .

(D) To bar or extinguish any easement or interest in the nature of an easement, or any rights granted, excepted, or reserved by the instrument creating such easement or interest, including all rights for future use, if the existence of such easement or interest is evidenced by the location beneath, upon, or above any part of the land described in such instrument of any pipe, valve, road, wire, cable, conduit, duct, sewer, track, pole, tower, or other physical facility and whether or not such facility is observable;

(E) To bar or extinguish any mortgage recorded in conformity with section 1701.66 of the Revised Code;

(F) To bar or extinguish any right, title, or interest of the United States, or of the state of Ohio, or any political subdivision, body politic, or agency thereof.

The Model Act also differs from the Ohio Act in that the Ohio Act gives a three year grace period for recording claims which have been extinguished by the passage of forty years after the effective date of the root of title. This three year period ended September 29, 1964, and was repealed on December 17, 1973; except for mineral rights, which time was extended until December 31, 1976, because of the deletion of mineral rights from the exceptions under §5301.53, effective December 31, 1973. The Model Act allowed only a two year grace period.

⁸ P. BASYE, *CLEARING LAND TITLES* 431 (2d ed. 1970) [hereinafter cited as BASYE].

⁹ *Id.*; O. BROWDER JR., R. CUNNINGHAM, & J. JULIN, *BASIC PROPERTY LAW* 975 (2d ed. 1973), points out that fifteen states now have such legislation. They are: Connecticut, Florida, Illinois, Indiana, Iowa, Michigan, Minnesota, Nebraska, North Dakota, Ohio, Oklahoma, South Dakota, Utah, Vermont, and Wisconsin.

¹⁰ *Id.* Those states whose Acts are patterned after the Model Act are: Connecticut, Florida, Indiana, Iowa, Ohio, Oklahoma, and Utah.

¹¹ *Id.*

"We received your letter today enclosing application for loan for your client, supported by abstract of title. Let us compliment you on the able manner in which you prepared and presented the application. However, you have not cleared the title before the year 1803, and therefore, before final approval can be accorded the application, it will be necessary that the title be cleared back of that year."

Annoyed, the lawyer replied:

"Your letter regarding titles in Case No. 189156 received. I note that you wish titles extended further back than I have presented them. I was unaware that any educated man in the world failed to know that Louisiana was purchased from France in 1803. The title to the land was acquired by France by right of conquest from Spain. The land came into possession of Spain by right of discovery made in 1492 by a sailor named Christopher Columbus, who had been granted the privilege of seeking a new route to India by the then reigning monarch, Isabella. The good queen, being a pious woman, and [as] careful about titles, almost, I might say, as the RFC, took the precaution of securing the blessings of the Pope upon the voyage before she sold her jewels to help Columbus. Now the Pope, as you know, is the emissary of Jesus Christ, The Son of God, who, it is commonly accepted, made the world. Therefore, I believe it is safe to presume that he also made that part of the United States called Louisiana, and I hope to hell you are satisfied."¹²

When the committee finished the Model Act¹³ it was in reality three distinct acts which, when combined, fulfilled the purpose of shortening the length of search time to a period of only forty years.

First, the Model is similar to a statute of limitations in that the filing of a notice is required to preserve a right of action founded upon any transaction which occurred prior to the forty year period.¹⁴ It is more than a statute of limitations, however, because it runs even against persons under disabilities.¹⁵

Second, the Model Act has attributes of a curative act by operating to correct certain defects which have arisen in the execution of

¹² Aigler, *Marketable Title Acts*, 13 U. MIAMI L. REV. 47, 49 (1958). For other examples of problems prior to the Marketable Title Acts, including specific mention of Ohio cases, see Aigler, *Title Problems in Land Transfers*, 24 MICH. ST. B. J. 202, 205-13 (1945).

¹³ The Model Act was completed in 1960. L. SIMES, *HANDBOOK OF THE LAW OF FUTURE INTERESTS* 111 (1966).

¹⁴ C. SMITH & R. BOYER, *SURVEY OF THE LAW OF PROPERTY* 260 (2d ed. 1971) [hereinafter cited as SMITH & BOYER].

¹⁵ Boyer & Shapo, *Florida's Marketable Title Act: Prospects and Problems*, 18 U. MIAMI L. REV. 103, (1963).

instruments in the chain of title.¹⁶ Yet, it goes beyond general curative statutes because it actually invalidates interests instead of merely curing formal defects.¹⁷

Third, the Model Act can be compared to a recording act because it requires that notice be given to the public of the existence of conditions and restrictions arising from ancient records,¹⁸ but again surpasses the recording acts in requiring re-recording of outstanding interests in order to preserve them.¹⁹

Therefore, by using and adding to the basic concepts of the recording acts, the curative acts, and statutes of limitation, the Model Act enables the title examiner to employ the following simplified procedure. At the time marketability is to be determined, the title examiner must search back forty years, and find the first title transfer before this forty year period. This is the root of title for the property in question.²⁰ This transfer, and all subsequent transfers, are basically all that the title examiner must concern himself with in regard to his title search. The only three methods by which a claim prior to the root may still be in existence are by: 1. a recording under the Notice Index;²¹ 2. a *specific* mention of an older transaction in one of the muniments of title²² in the forty year period;²³ or 3. a right arising from adverse possession, which possession was in whole or in part subsequent to the effective date of the root of title.²⁴ The first two will be discussed in detail.

Besides shortening the time needed by the title examiner to search the record for defects, the Model Act has an ancillary attribute. It extinguishes ancient records and interests which "fetter the marketability of real estate,"²⁵ barring these lesser interests which conflict with the fee on the rationale that these interests are insignificant compared to the value gained by freeing the land through a shorter title search. Such is the case in *Semachko v. Hopko*.²⁶

¹⁶ SMITH & BOYER, *supra* note 14, at 260.

¹⁷ Boyer & Shapo, *supra* note 15, at 104.

¹⁸ SMITH & BOYER, *supra* note 14, at 260.

¹⁹ Boyer & Shapo, *supra* note 15, at 104.

²⁰ Model Act §8(e), *see* BASYE, *supra* note 8, at 381.

²¹ Model Act §5; *see* BASYE, *supra* note 8, at 379-80.

²² "Muniments of title" are those instruments of writing and written evidence which the owner of lands . . . has, and by which he is enabled to defend the title of his estate. 3 R. HAUSSE & W. VAN AKEN, OHIO PRACTICE §141 (1964).

²³ Model Act §2(a); *see* BASYE, *supra* note 8, at 378.

²⁴ Smith, *The New Marketable Title Act*, 22 OHIO ST. L. J. 712, 718 (1961).

²⁵ *Wichelman v. Messner*, 250 Minn. 88, 100, 83 N.W.2d 800, 812 (1957).

²⁶ 35 Ohio App.2d 205, 301 N.E.2d 560 (8th Dist. 1973).

Semachko v. Hopko*Facts*

Hopko purchased property in a subdivision in which Semachko had a residential dwelling. Hopko purchased the property in order to erect a commercial dwelling, a mortuary, and the council of the City of Parma rezoned Hopko's property to achieve this purpose.

Semachko then brought an action for declaratory judgment, injunction, and other relief, alleging that all the lots in the subdivision had the same deed restriction that ran with the land, to wit:

. . . That no building shall be erected or suffered to be erected on said lot nearer than 35 feet to the sidewalk line and to cost at least \$1,200. *Said building to be used for private residence purposes only.*²⁷ [emphasis added]

Hopko's answer denied the restriction on the use of their property based on the Ohio Marketable Title Act, §§5301.47 through 5301.56, inclusive, of the Ohio Revised Code.

The following is illustrative of the record of transfers for the property in question, Original Sublot 2.

March 4, 1912	S. H. Kleinman — 46 lots, with restrictions on all lots when he transferred them.
December 3, 1920	to Sara Dooley — Sublot 2 use restriction “. . . to be used for residence purposes only.”
May 26, 1922	to Emma Sargis — Sublot 2 use restriction “. . . to be used for residence purposes only.”
March 4, 1932	to William Sargis, <i>small</i> portion of Sublot 2. No restrictions in deed.
August 5, 1950	to Joe and Anna Klamar, <i>large</i> portion of Sublot 2, no restriction in deed.

²⁷ *Id.* at 212, 301 N.E.2d at 564-65.

Period 1959-1960

to Joe and Anna Klamar, *small* portion of Sublot 2, no restriction in deed.

May 1, 1967

to Walter G. Gazda and Adlyn G. Gazda, all of *original* Sublot 2.

December 4, 1970

to Charles, Dorothy and Cheryl Hopko, no specific restriction, only to "restrictions of record."

December 14, 1970

Plaintiffs filed complaint.

July 10, 1972

Trial.

The trial court granted a temporary restraining order, and the case proceeded to trial. Judgment was for the defendant purchasers, the Hopkos.

The decision in the lower court was not based on the Ohio Marketable Title Act. Instead, the traditional test of "substantial change in conditions" was used, the trial court finding:

. . . that the nature of Broadview Road has changed substantially in recent years and the changes have been so drastic that the intent of the deed restriction to preserve the residential nature of the locality has been nullified. The district is business and not residential in nature.²⁸

On appeal, the Eighth District Court of Appeals considered two principal issues:

1. Whether the restriction in the use of the subject property for private residence purposes only is valid or was extinguished under the Ohio Marketable Title Act. §§ 5301.47 through 5301.56, Ohio Revised Code; and

2. Whether there have been substantial and drastic changes in the neighborhood which would nullify the deed restrictions.²⁹

Semachko and the Act

The court of appeals in *Semachko*, recognizing the technical nature of the Ohio Marketable Title Act,³⁰ [hereinafter referred to

²⁸ *Id.* at 208, 301 N.E.2d at 562.

²⁹ *Id.* at 209, 301 N.E.2d at 562-63.

³⁰ OHIO REV. CODE ANN. §§5301.47-.56 (Page 1970), as *admmended* (§§5301.53 & 5301.56) (Page, Current Material 1974).

as the Act], began its review of the Act by defining those who may invoke it to obtain a marketable record title:

Any person having legal capacity to own land in this State, who has an unbroken chain of title of record to any interest in land for forty years or more, has a marketable record title to such interest. A person has such an unbroken chain of title when the official public records disclose a conveyance or other title transaction of record of not less than forty years at the time the marketability is to be determined. The conveyance or other title transaction must purport to create such interest, either in the person claiming it or in some other person from whom, by one or more conveyances or other title transactions of record, such purported interest has become vested. However, nothing must appear of record purporting to divest such claimant of such purported interest.³¹

In effect, the Act says that if *A* has had title to Blackacre for a period in excess of forty years, with no other conveyances taking place within the forty year period, then *A* has whatever marketable record title was given to him by that prior conveyance. If the interest was a fee simple absolute, then *A* has a marketable record title to the land in fee simple absolute. If it was a lesser fee, then this is all that *A* has, for *A* cannot claim more from the title he is using to determine his marketability than the title grants.³²

Also, *A* can claim marketable title through those prior title holders during the forty year period prior to the date on which marketability is being determined. For example, if *A* purchased from *B* in 1970, and *B* purchased from *C* in 1930, and *A*'s marketability is being determined as of 1973, then *A* can claim through *B* and *C*, and whatever title *C* had in 1930 will be used to determine *A*'s marketability. Thus, the prescribed period of forty years is not an absolute limit, but must be combined with whatever additional period is needed until a conveyance is encountered which purports to vest the interest under investigation.³³

However, in neither of the situations above may anything appear of record purporting to divest the claimant, who is attempting to determine marketability, from his purported interest.³⁴ Therefore, in

³¹ 35 Ohio App.2d 205, 209, 301 N.E.2d 560, 563 (8th Dist. 1973).

³² 2 T. McDERMOTT, OHIO REAL PROPERTY LAW AND PRACTICE §1-44A (Supp. 1972). *But cf.* *Wichelman v. Messner*, 250 Minn. 88, 83 N.W.2d 800 (1957). The Minnesota Act is quite different from the Ohio and the Model acts.

³³ BAYNE, *supra* note 8, at 375.

³⁴ 35 Ohio App.2d 205, 209, 301 N.E.2d 560, 563 (8th Dist. 1973); OHIO REV. CODE ANN. §5301.48 (Page 1970).

the last example, if *A*'s transferred interest from *B* contained a specific use restriction, then this use restriction is a part of *A*'s title notwithstanding the fact that no such restriction was contained in *C*'s title. The restriction from *B* to *A* affects *A*'s fee simple absolute interest contained in the root of title of *C*, but only by the inclusion of the use restriction in *A*'s interest.

It must be noted that the Act does not undertake to formulate a precise definition of marketability,³⁵ but by eliminating those matters of record created prior to the effective root of title, the Act in effect defines marketable title as the root of title and the period thereafter to the present.

As the court in *Semachko* declares:

"Marketable record title" means a title of record, which operates to extinguish such interests and claims existing prior to the effective date of the root of title. R.C. 5301.47 (A). Subject to certain exceptions stated in R.C. 5301.49, record marketable title shall be held by its owner and shall be taken by any person dealing with the land free and clear of all interests, claims or charges whatsoever, the existence of which depends on any act, transaction, event or omission that occurred prior to the effective date of the root of title. R.C. 5301.50.³⁶

Thus, rather than actually defining marketability, the Act limits and prescribes the time from which that determination is to be made,³⁷ and anything outside the scope of that time is extinguished, subject to certain exceptions.³⁸ However, that the Act defines the period of time from which the marketability of the title is to be determined is not to say that the title is marketable in the popular or commercial sense,³⁹ because the property may be in a slow-moving area or even swamp land. Rather, it is marketable in the technical sense that it will point out any encumbering defects which might inhibit any transfer, or declares that no such defects exist.

In regard to defects not of record: if they occurred prior to the effective date of the root of title, they are no longer viable.⁴⁰ But if they occurred *after* the root, then they may still affect the interest

³⁵ BASYE, *supra* note 8, at 371.

³⁶ 35 Ohio App.2d 205, 209-10, 301 N.E.2d 560, 563 (8th Dist. 1973).

³⁷ BASYE, *supra* note 8, at 371.

³⁸ The exceptions are in OHIO REV. CODE ANN. §5301.53 (Page 1970), as amended (Page Current Material 1974), and are discussed *infra* at The Act Outside *Semachko*.

³⁹ L. SIMES & C. TAYLOR, IMPROVEMENT OF CONVEYANCING BY LEGISLATION 11 (1960).

⁴⁰ BASYE, *supra* note 8, at 373.

in question. For this reason policies of title insurance will still be an important, and often a necessary, part of a title transfer transaction.

Applying these concepts to the facts in *Semachko*, the court determined that the Hopkos had two separate roots of title to the land because of the split in 1932 of Original Sublot 2.⁴¹ The court said the Act, which was to be liberally construed, defined "root of title" as:

. . . that conveyance or other title transaction in the chain of title of a person purporting to create the interest claimed by such person, upon which he relies as a basis for the marketability of his title, and which was the most recent to be recorded as of a date forty years prior to the time when marketability is being determined. The effective date of the root of title is the date on which it is recorded. R.C. 5301.47 (E).⁴²

Marketability was being determined by the court as of July 10, 1972, the time of the trial.⁴³ The first step in applying the Act was to go back forty years (July 10, 1932), and then to find the first recorded title transaction prior to July 10, 1932. In this case, it was the March 4, 1932 transfer from Emma Sargis to William Sargis for the smaller portion of Sublot 2. This, then, is the root of title for the smaller portion of Sublot 2.⁴⁴ There were no restrictions in this deed.

The next step in determining marketability for the smaller portion of Sublot 2 was to take the root of title, and any defects and interests which are inherent in the muniments of the recorded title, and see if there were any restrictions. Since the only mention of any restrictions in the muniments was in the December 4, 1970 transfer to Charles, Dorothy, and Cheryll Hopko, and since this was only a general reference to "restrictions of record," then there were no restrictions on this smaller portion of Sublot 2.⁴⁵ The Act is quite clear that indefinite references will not suffice to keep alive a restriction on property.⁴⁶ The reference, to maintain such restriction, must be specific and must spell out in clear language what the restriction is and from where it came.

⁴¹ 35 Ohio App.2d 205, 215, 301 N.E.2d 560, 566 (8th Dist. 1973).

⁴² *Id.* at 210, 301 N.E.2d at 563.

⁴³ *Id.* at 214, 301 N.E.2d at 565.

⁴⁴ *Id.* at 215, 301 N.E.2d at 566.

⁴⁵ *Id.*

⁴⁶ *Id.* at 210, 301 N.E.2d at 563. OHIO REV. CODE ANN. §5301.49(A) (Page 1970) states that:

. . . a general reference in such muniments, or any of them, to easements, use restrictions, or other interests created prior to the root of title shall not be sufficient to preserve them, unless specific identification be made therein of a recorded title transaction which creates such easement, use restriction, or other interest

The recording notice, which would have kept this use restriction functional, would have had to be filed prior to March 4, 1972, and this was not done.⁴⁷ Again, the Act is quite clear on this point, and as the court summarizes this section of the Act:

Any person claiming an interest in land may preserve and keep effective such interest by filing for record a notice of such interest in writing with the county recorder during the forty year period immediately following the effective date of the root of title of the person whose record title would otherwise be marketable. . . .⁴⁸

Thus, the use restriction on the smaller portion of Sublot 2 was extinguished by the Act.⁴⁹

But the result was different with the larger portion of Sublot 2. Again applying the Act, the first step was to go back in time forty years before the time marketability was being determined, and then search for the first title transfer prior to that date (July 10, 1932). This was the transfer from Sarah Dooley to Emma Sargis on May 26, 1922, and is the root of title for the larger portion of Sublot 2. Since the use restriction, ". . . to be used for residence purposes only," is specifically mentioned in this deed, then the use restriction on the larger portion is still binding.⁵⁰ This is true even though the restriction is more than forty years old and has not been protected through a recording notice in the Notice Index. The restriction is in the root of title itself, which is, of course, one of the muniments of the title for the larger portion of Sublot 2, and the Act does not extinguish "interests and defects which are inherent in the muniments of the chain of record title."⁵¹ Therefore, the use restriction is still binding on the larger portion of Sublot 2.

The court then stated that the same rules apply in preserving a subdivision use restriction on the whole subdivision.⁵² The three methods by which that result could be accomplished accrue if the use restriction was either:

⁴⁷ OHIO REV. CODE ANN. §5301.51 (Page 1970). For a worthwhile comment on the recording provision see L. SIMES, *HANDBOOK OF THE LAW OF FUTURE INTERESTS* 111-12 (2d ed. 1966).

⁴⁸ 35 Ohio App.2d 205, 210, 301 N.E.2d 560, 563 (8th Dist. 1973); OHIO REV. CODE ANN. §5301.51(A) (Page 1970).

⁴⁹ 35 Ohio App.2d 205, 215, 301 N.E.2d 560, 566 (8th Dist. 1973).

⁵⁰ *Id.* at 215-16, 301 N.E.2d at 566; OHIO REV. CODE ANN. §5301.49(A) (Page 1970). See *supra* note 46.

⁵¹ 35 Ohio App.2d 205, 210, 301 N.E.2d 560, 563-64 (8th Dist. 1973); OHIO REV. CODE ANN. §5301.49(A) (Page 1970). This section of the Ohio Act is included in the majority of the Marketable Title Acts, but when it is not included the result is contra. See, e.g., *Wichelman v. Messner*, 250 Minn. 88, 83 N.W.2d 800 (1957), wherein a use restriction was deemed extinguished by the passage of the forty year period antedating the root of title. This result was true even though the use restriction was in the root itself.

⁵² 35 Ohio App.2d 205, 211-12, 301 N.E.2d 560, 564 (8th Dist. 1973).

1. specifically stated or identified in the root of title of every parcel in the subdivision;
2. specifically stated or identified in the muniments of record chain of title of every parcel in the subdivision; [or]
3. recorded pursuant to . . . [preserving notice requirements] . . . against every parcel or against the entire subdivision.⁵³

Thus, the court decided that the use restriction on the larger portion of Sublot 2 was still binding, but that the restriction on the smaller portion of Sublot 2 had been extinguished by the Act.

The court then went on to consider the second issue of whether the use restriction was nullified by the "substantial and drastic changes in the neighborhood."⁵⁴ Affirming the lower court, the opinion read:

After carefully reviewing the record . . . reasonable minds can come to different conclusions whether there was a substantial change in the character of the neighborhood in the vicinity of the property of plaintiffs and defendants so as to nullify the deed restrictions limiting the use of the property for residential uses only. . . . The trial court found there was a substantial change in the character of the neighborhood. Under such circumstances an appellate court must affirm the judgment of the trial court.⁵⁵

The end result of *Semachko* is the same as in the lower court. The use restriction of Original Sublot 2 is nullified by the change in the condition of the neighborhood. But the importance of *Semachko* goes beyond the mere affirmance of the lower court's ruling. The real importance of *Semachko* is found in the court's long-overdue willingness to examine and to apply the basic precepts of the Ohio Marketable Title Act.

The Act Outside *Semachko*

Semachko outlined the main concepts of the Act and how they function, but some provisions of the Act were not discussed because they had no application to the facts in *Semachko*.

The first provision of the Act which was not discussed is an exception to the statement that the record marketable title is subject to ". . . all interests and defects which are inherent in the muniments

⁵³ *Id.*

⁵⁴ *Id.* at 209, 301 N.E.2d at 563.

⁵⁵ *Id.* at 216, 301 N.E.2d at 566.

of which such chain of record title is formed. . . ."⁵⁶ Besides the exception of the specific mention, as opposed to general reference, in one of the muniments to a restriction in a deed prior to the root of title, referred to in *Semachko*, this unmentioned exception involves the case of a possibility of reverter, right of entry or power of termination for breach of a condition subsequent.⁵⁷ Seemingly, the legislature found these restrictions more undesirable than any of the others and therefore departed from the Model Act⁵⁸ by making even a *specific mention* in the root, of one of these restrictions found in a deed prior to the root, ineffective to keep them alive.⁵⁹ The Ohio Act also allows their extinguishment if they are named in the muniments but have existed for *more* than forty years following the effective date of the root of title.⁶⁰ The only method of keeping either of these restrictions alive is found in §5301.51, which enables the claimant to file, within the forty year period following the effective date of the root of title, a written notice, duly verified by oath, setting forth the nature of the claim.⁶¹ For example, if the fact pattern were:

A	—	owner in fee simple absolute
to B	— January 1, 1913	deed with possibility of reverter
to C	— January 1, 1927	deed with specific mention of the possibility of reverter
to D	— January 1, 1973	deed with no mention of the possibility of reverter, but general statement that the title is subject "to all restrictions of record",

and marketability is being determined as of February 1, 1973, title would be deemed one in fee simple absolute. The restriction on the deed conveyed in 1927, despite its specific mention, is extinguished by the Act, unless during the forty-year period following the effective date of the root of title (which is the deed in the 1927 transfer) a claimant has filed the necessary notice in the Notice Index to preserve the possibility of reverter. Since this has not been done, the possibility of reverter is no longer part of the holder's title.

Even if a claimant has recorded his notice in the Notice Index, this recording must be done again and again within forty years each time a later transfer of the land becomes a new root of title.⁶² The

⁵⁶ OHIO REV. CODE ANN. §5301.49(A) (Page 1970), set out *supra* note 7.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ OHIO REV. CODE ANN. §5301.49(A) (Page 1970).

⁶⁰ *Id.*

⁶¹ OHIO REV. CODE ANN. §5301.51(A) (Page 1970).

⁶² Barnett, *Marketable Title Acts — Panacea or Pandemonium?*, 53 CORNELL L. REV. 45, 83 (1967).

Act requires the filing of the interest for the preservation of a possibility of reverter, a right of entry or power of termination for breach of condition subsequent, within the forty-year period following the effective date of the root of title.⁶³ Therefore, when the root of title changes there must be found a record in the Notice Index of this interest within the forty year period after the new root of title, or the interest will be extinguished.⁶⁴

In our hypothetical, *C*'s deed to *D* becomes the new root of title on January 1, 2013, and even if a claimant had recorded the possibility of reverter prior to January 1, 1967, which would have preserved it on *C*'s title, the claimant would have to record it again prior to January 1, 2013 in order to preserve it still further. If the claimant fails to file his recording during the forty year period prior to January 1, 2013, the effect is to extinguish the possibility of reverter just as if it had never been recorded in the Notice Index prior to 1967.

As Professor Basye points out:

The prime objective of the Marketable Title Acts in limiting the period of record search and examination is accomplished by this very simple but most important provision affecting the recording acts in requiring periodic rerecording on nonpossessory interests. The boon to the cause of marketability is immeasurable, while the additional burden to the owners of obscure interests is negligible.⁶⁵

The probable result of this re-recording process will be that those interests which are no more than ones created by errors in conveying, or genuine ones which are no longer useful to the owner, will be extinguished by the Act because there will be no recording or re-recording.⁶⁶ Valid claims will be filed in the Notice Index and the title examiner will find these claims in his search of the period following the root of title. Consequently, the search time is reduced appreciably and outmoded interests are extinguished, while valid interests will be protected.⁶⁷

Another application of the Act which should be mentioned is the effect of the forty-year period specified in the Act in determining marketability when applied to "Wild Deeds."⁶⁸

⁶³ Smith, *supra* note 24, at 719.

⁶⁴ *Id.*

⁶⁵ BASYE, *supra* note 8, at 369.

⁶⁶ *Id.* at 367.

⁶⁷ *Id.*

⁶⁸ 3 R. HAUSSE & W. VAN AKEN, OHIO PRACTICE 143-44 (1964).

Since the purpose of the marketable title statutes is to eliminate the need for searching back to the sovereign, such statutes are not concerned with the quality of the title conveyed by the root. So long as the instrument serving as the root of title *purports* to convey an interest, it is effective to extinguish prior claims and interests. Thus, it is possible even for the grantee of a complete stranger to divest the title of a record owner.⁶⁹

Thus, a fraudulent conveyance can become the root of title under the Act and divest the real owner of his interest.⁷⁰ The following pattern will achieve this result:

BLACKACRE

<i>WILD DEED</i>		<i>ACTUAL DEED</i>	
X	(stranger to deed)	A	owner in fee simple of Blackacre
Y	(1932)	B	1900 — in fee simple
Z	(1973)	C	1931
		D	1973

If marketability is being determined as of 1973, X, who had no interest in the land in question, by his fraudulent conveyance to Y, has effectively divested D of his interest in the land. The "Wild Deed" is now the legal title because the Act allows the 1932 transfer to become the root of title and marketability is determined from that point hence. From an equitable viewpoint this is a drawback of the Act, but a strict statutory constructionist would retort that this result helps fulfill the Act's espoused purpose — simplifying and facilitating land title transfers.

There are also some interests which the Act specifically excludes from its operation. The Act provides that:

The provisions of sections 5301.47 to 5301.56, inclusive, of the Revised Code, shall not be applied:

(A) To bar any lessor or his successor as reversioner of his right to possession on the expiration of any lease or any lessee or his successor of his rights in and to any lease;

⁶⁹ Barnett, *supra* note 62, at 57.

⁷⁰ Marshall v. Hollywood, 224 So.2d 743 (Fla., 1969). Defendant's deed was fraudulently obtained by defendant's predecessors in title. Defendant knew that his title was fraudulent, but contended that under the Florida Marketable Title Act this was not an issue. The court agreed at 749:

... [S]ince the purpose of the act is to allow persons to rely on the record title to real property, it would be inconsistent to construe the words "vested . . . of record" in that sentence in such a way as to require an inquiry behind the record.

Contra, Exchange Nat'l Bank v. Lawndale, 41 Ill.2d 316, 243 N.E.2d 193 (1968).

(B) To bar or extinguish any easement or interest in the nature of an easement created or held for any railroad or public utility purpose;

(C) To bar or extinguish any easement or interest in the nature of an easement, the existence of which is clearly observable by physical evidence of its use;

(D) To bar or extinguish any easement or interest in the nature of an easement, or any rights granted, excepted, or reserved by the instrument creating such easement or interest, including any rights for future use, if the existence of such easement or interest is evidenced by the location beneath, upon, or above any part of the land described in such instrument of any pipe, valve, road, wire cable, conduit, duct, sewer, track, pole, tower, or other physical facility and whether or not the existence of such facility is observable;

(E) To bar or extinguish any mortgage recorded in conformity with section 1701.66 of the Revised Code;

(F) To bar or extinguish any right, title, or interest of the United States, or of the state of Ohio, of any political subdivision body politic, or agency thereof.⁷¹

Therefore, the Act may not be applied against:

1. a lessor or lessee, or their successors, to bar them from any rights they may have under any lease;
2. any easement held by or for
 - a. a railroad,
 - b. a public utility, or
 - c. any other easement holder, if the use of the easement is observable;
3. any easement, or the rights therefrom, if the existence of the easement is evidenced by the location beneath, upon, or above any part of the land described in the instrument granting the easement by any physical facility, regardless of whether or not the physical facility is readily observable;
4. any mortgage recorded in conformity with Ohio law for the recording of public utility mortgages;⁷² and

⁷¹ OHIO REV. CODE ANN. §5301.53 (Page 1970), *as amended* (Page, Current Material 1974).

⁷² OHIO REV. CODE ANN. §1701.66 (Page 1970).

5. any interest in land of any political subdivision of Ohio, or the State of Ohio itself, or the United States.⁷³

It is evident from a cursory glance at these exceptions that the title examiner's work is greatly hampered by these exclusions from the Act. Since there is no time limit in the exceptions, the title examiner must always search for them far past the period specified in the Act for determining marketability. In addition, some type of physical observation of the property by the searcher would appear to be a necessity. But even with these exceptions, which have not gone without criticism,⁷⁴ the Ohio Marketable Title Act can do much to further the free and unencumbered transfer of land in Ohio.⁷⁵

Last, in *Semachko* the question of the constitutionality of the Act was not raised,⁷⁶ although the court did say that these acts had been upheld in other states when their constitutionality had been raised.⁷⁷ The two primary reasons the other acts have been upheld are also found in the Ohio Act. The first is the recording of a notice of claim,⁷⁸ discussed in *Semachko*. The second is the grace period which, in the Ohio Act, extended the forty-year period of effectiveness of the Act in extinguishing interests in land for a period of three years after the effective date of the Act.⁷⁹ In the event the constitutionality of the Act is ever questioned, it seems most probable that it would be upheld because of these inclusions.⁸⁰

Conclusion

The need for legislation which would reduce the amount of time needed to search land titles for defects has long been recognized. In 1961 Ohio joined those states having such legislation by the passage of the Ohio Marketable Title Act, which was patterned directly after the Model Act prepared by Simes and Taylor for the American Bar Association.

The Ohio Act was discussed for the first time in *Semachko v. Hopko*, decided in 1973, and the court discussed the general prin-

⁷³ See Barnett, *supra* note 62, at 77, for a discussion of the sovereign exemption.

⁷⁴ Smith, *supra* note 24, at 715-16.

⁷⁵ *Id.* at 720.

⁷⁶ 35 Ohio App.2d 205, 212, 301 N.E.2d 560, 564 (8th Dist. 1973).

⁷⁷ *Id.*, citing *Wichelman v. Messner*, 250 Minn. 88, 83 N.W.2d 800 (1957); *Tesdell v. Hanes*, 248 Iowa 742, 82 N.W.2d 119 (1957).

⁷⁸ OHIO REV. CODE ANN. §5301.51-.52 (Page 1970). For discussion of this portion of the Act and its effect on constitutionality see Barnett, *supra* note 62, at 52-53.

⁷⁹ OHIO REV. CODE ANN. §5301.56 (Page 1970), *as amended* (Page, Current Material 1974). See also *Tesdell v. Hanes*, 248 Iowa 742, 82 N.W.2d 119 (1957).

⁸⁰ For discussion of the constitutionality of Marketable Title Acts generally see Note, *Constitutionality of Marketable Title Legislation*, 47 IOWA L. REV. 413 (1962); BASYE, *supra* note 8, at §175; L. SIMES & C. TAYLOR, *IMPROVEMENT OF CONVEYANCING BY LEGISLATION* 253-73 (1960).

ciples of the Act and how they should be applied. The term "root of title" was defined and explained, and the court described how it, and the other muniments of the title to the land in question, determine the marketability of that title.

Other provisions of the Act applicable in *Semachko* were explained and expounded upon, such as the definition of "marketable record title," and who may invoke the Act to claim such "marketable record title." In addition, the court outlined what restrictions the "record marketable title" in *Semachko* was and was not subject to. Finally, the court gave an explanation of what is necessary in order to maintain or extinguish an interest in land if the interest was in existence prior to the effective date of the root of title.

Then, turning away from the Act, the court in *Semachko* briefly discussed the effect of substantial changes in the character of a neighborhood, on restrictions in a deed.

The importance of *Semachko* is not in any way diminished by the court's failure to include a discussion of the provisions of the Act which had no bearing on the problem which *Semachko* presented. Discussion of the Act by an Ohio court was long overdue and much needed. *Semachko* supplied that need. It spelled out the basic principles of the Act for other courts to follow, and gave the title examiner, whether an attorney or an employee of a title company, the much-needed guidelines to follow in applying the Act to achieve its avowed purpose: the shortening of the time needed to perform a land title search. *Semachko* gave the Ohio Marketable Title Act what it sorely needed for twelve years — its chance before the tribunal.

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